U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 05 December 2005

BALCA Case No.: 2004-INA-129
ETA Case No.: P2002-PA-03375415

In the Matter of:

POLICE ATHLETIC LEAGUE,
Employer,

on behalf of

JERRY OKEY,
Alien.

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Appearance: David E. Piver
For the Employer

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification on behalf of Jerry Okey ("the Alien") filed by Police Athletic League ("the Employer") pursuant to section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act") and Title 20, Part 656 of the Code of Federal Regulations.[1] The Certifying Officer

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

("CO") of the United States Department of Labor denied the application, and the Employer requested review pursuant to 20 C.F.R. § 656.26.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties.

STATEMENT OF THE CASE

On April 26, 2001, the Employer filed an application for labor certification on behalf of the Alien for the position of Teacher, Adult Education. (AF 54). On February 18, 2002 the Employer submitted a request for Reduction in Recruitment processing. (AF 49). In support of its request, the Employer noted its recruitment efforts to date.

On April 2, 2003, the CO issued a Notice of Finding ("NOF") indicating his intent to deny the application on the grounds that the Employer's wage offer of $24,000 was below the prevailing wage of $35,901. (AF 17-19). The CO noted that offering a salary below the prevailing wage is a violation of 20 C.F.R §§ 656.20(c)(2), 656.20(g), 656.21(g)(4) and 656.40. The Employer was advised that it had to increase the wage offer to meet or exceed the prevailing wage or submit an alternative wage survey. The CO also noted that it did not appear that the Alien's employment was full-time as the hours of employment were during the time the students, kids and teenagers, were in regular school. The CO advised the Employer that he should provide evidence that would demonstrate that there were sufficient students from 9:00 am to 5:00 am to support full-time employment for the Alien.

On April 29, 2003, the Employer submitted its Rebuttal. (AF 7-16). The Employer indicated that it was going to increase the wage offer to over $31,106 which was 95% of the prevailing wage rate. In support of its assertion that the employment opportunity was full-time, the Employer provided the United Way of Berks County Budget package showing statistics as to the prior year's student enrollment and the projected student enrollment for the current year. In response to the issue of hours of employment from 9:00 am to 5:00 pm, the Employer indicated

that they were an approximation, as the hours of actual employment may vary according to the time of the year the classes were being held. The Employer also indicated that as the position was newly created it could not provide a daily schedule reflecting the amount of time the Alien spent in the different tasks of the job. However, the growth of the student enrollment forced the creation of the full-time position and demonstrated that it was a *bona fide* job opportunity.

On May 6, 2003 the Employer submitted a document indicating its continuing request for Reduction in Recruitment. The Employer asserted that as noted in its Rebuttal, it had increased the wage offer and it had demonstrated that it was a *bona fide* full-time job opportunity.

On July 28, 2003, the CO issued a Final Determination denying certification. (AF 4-6). The CO accepted the Employer's correction of the wage offer deficiency. The CO noted, however, that the Employer's Rebuttal did not properly document that the position was a full-time position. The CO noted that although the documentation provided by the Employer indicated an increase in the number of students attending the Employer's classes, the Employer did not identify the universe of students being taught by the Alien from 9:00 am to 5:00 pm. Additionally, the CO found the Employer's assertions that the Alien taught art classes objectionable as that was not one of the job requirements listed in the job description. The CO also found that since the hours of employment from 9:00 am to 5:00 pm vary more than adhere to that schedule, neither the application nor the advertisement accurately reflected the work schedule required for the job. The CO concluded that the Employer failed to demonstrate that the position offered was a full-time job and consequently denied the labor certification application.

On August 25, 2003, Employer filed its Request for Review indicating that the CO erred in finding that the Employer had not demonstrated that the position was a full-time position. (AF 1-3). The Employer indicated that the fact that the schedule varied was insufficient basis to find that there was no full-time job opportunity.

On June 9, 2004, the Employer submitted its brief in support of its position that the CO erred in the denial of the labor certification application. The Employer cites *Dearborn Public Schools,* 1991-INA-222 (Dec 7, 1993) (*en banc*) in support of its argument that full-time teachers

are to be considered in full-time employment. The Employer also cites *Marrero*, 1986-INA-470 (1986), asserting that absent contrary evidence, an employer's claim of full-time employment will be accepted. The Employer asserted that the issue was whether or not the Alien was employed from 35 to 40 hours a week and not whether he was employed from 9:00 am to 5:00 pm. Additionally, as explained in the Rebuttal, it was clear that the employment was full-time in accordance with the regulations and the Farmer Memo. The Employer's Brief on Appeal, at 4 (June 9, 2004) *citing* Memo, Farmer, Admin. For Regional Management, Div. of Foreign Labor Certification, DOL Filed Memo No. 48-94 (May 16, 1994).

The Employer also alleges that the CO failed to provide adequate notice to rebut or cure the alleged defects. The Employer argues that the CO's initial request for documentation that the job was full-time employment was misleading as the CO in his Final Determination indicated a different basis for denial; that is, that the job advertisement was inaccurate as it reflected the time of employment to be from 9:00 am to 5:00 pm, when in fact the times varied. The Employer indicated that had it known that the issue was the time for the job to be performed it would have addressed it in its Rebuttal; but since it was not put on notice by the NOF, it did not address the issue. Consequently, the Employer argues that the lack of notice is reversible error. For those reasons, the Employer requests that the CO's findings be reversed and the labor certification be granted. In the alternative, the Employer requests that the case be remanded to allow the CO to address the issues raised by the Employer. The Board docketed the case on May 20, 2004.

DISCUSSION

Initially, the Employer contends that the NOF and Final Determination were confusing and misleading. We disagree. Both the NOF and the Final Determination clearly indicated that the Employer failed to establish that the position offered was a full-time job opportunity. Indeed, the CO set forth specific instructions advising the Employer how to cure the deficiency. In the Final Determination, the CO did not deny certification based on different grounds than those explained in the NOF as the Employer argues. Instead, the CO's Final Determination simply explains further the nature of the Employer's deficiency; specifically, that the position did not appear to be a full-time job. In other words, the fact that the teaching times reflected in the

rebuttal material varied—rather than being 9:00 am to 5:00 pm as stated in the advertisement—further demonstrates that the Employer was unable to document with convincing evidence what the specific duties and time spent performing those duties were, and therefore failed to prove that the position was full-time. Consequently, the Employers request that the case be remanded to the CO because of the misleading nature of the NOF and Final Determination is denied.

It is well-settled that the employer bears the burden of proof in certification applications. 20 CFR § 656.2(b); *see Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997). Here, the CO specifically instructed the Employer to submit documentation establishing that the offered position is a full-time job opportunity. If the CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Collectors International, Ltd.*, 1989-INA-133 (Dec. 14, 1989). Moreover, if the CO requests documentation having a direct bearing on the resolution of an issue and it is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Here, the Employer attempted to explain that the position is in fact full-time. The Employer, however, did not provide sufficient evidence to cure the deficiency announced in the NOF or to corroborate its assertions. Specifically, the rebuttal evidence did not show the precise duties and time required of the position to demonstrate that it is full-time employment. Although an employer's written assertion constitutes documentation under *Gencorp*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer, Corp.,* however, this panel recognized that a remand is not required in those circumstances where the application is so fundamentally flawed that a remand would be pointless, such as, here, when a finding of a lack of a full-time job opportunity exists. *See Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the Employer has failed to demonstrate that a full-time job opportunity exists. Accordingly, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.